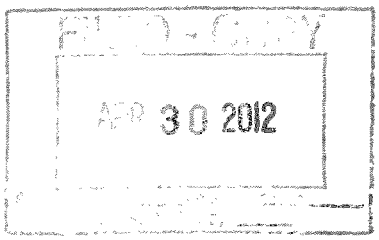
4-30-2012

Phillips v. Blazier-Henry Appellant's Reply Brief Dckt. 38666

IN THE SUPREME COURT OF THE STATE OF IDAHO

LEON PHILLIPS, an unmarried man, and EARLINE CHANCE, an unmarried woman, Plaintiffs, vs. CAROLE BLAZIER-HENRY, an individual, Defendants.	CASE NO. CV-2009-00085 DOCKET NO. 38666-2011
ROY JACOBSON, Third Party Purchaser/Intervenor/Appellant, vs. LEON PHILLIPS, an unmarried man, and EARLINE CHANCE, an unmarried woman; and CAROL BLAZIER-HENRY, an individual, Third Party Defendants/Respondents.	



APPELLANT'S REPLY BRIEF
and
BRIEF IN RESPONSE TO CROSS-APPELLANTS'S BRIEF

APPEALED FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR BONNER COUNTY

HONORABLE STEVE VERBY
District Judge

Brent C. Featherston, Esq.
FEATHERSTON LAW FIRM, CHTD.
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
ATTORNEYS FOR APPELLANT

Arthur M. Bistline, Esq.
1423 North Government Way
Coeur d'Alene, ID 83814
(208) 665-7270

ATTORNEY FOR RESPONDENT/
CROSS-APPELLANT

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I. STATEMENT OF THE CASE/PROCEDURAL HISTORY

The Appellant, Roy Jacobson ("Jacobson") will not restate the facts and procedural history as set forth in Appellant's Brief or Respondent/Cross-Appellant's Brief. However, to the extent Respondent/Cross-Appellant Chance ("Chance") has raised certain issues in their Statement of the Case, Jacobson responds as follows:

Beginning at page 2 of Chance's Brief, they assert that their former counsel, attorney Fonda Jovick, believes that the Bonner County Sheriff's Department would "automatically bid in the amount set forth in the Writ of Execution". The record on this point is clear only to the extent that Chance's former counsel, Fonda Jovick, harbored some belief that the Bonner County Sheriff would enter a credit bid. It is unclear, except for counsel's explanation of procedures in Kootenai County, why or on what basis counsel held that belief. Nothing in the record reflects the Sheriff misled Ms. Jovick.

The Affidavit of Fonda Jovick and her assistant, Tiffany Storro, reflect a number of facts, which are disputed and which are as follows:

1. Her assistant, Tiffany Storro, inquired of the Bonner County Sheriff's Department "exactly what was required from the law firm……to complete a real property sheriff's sale subsequent to a foreclosure judgment."

2. Ms. Jovick's firm had "never completed a Sheriff's Sale in Bonner County".

3. That Ms. Storro "firmly believed that Diana (Bonner County Sheriff's personnel) would enter a credit bid in the amount of the Writ of Execution at the Sheriff's Sale", but Ms. Storro fails to state on what basis she held that "firm belief".

While her Affidavit indicates that she interviewed the Sheriff's Department as to the procedure for completing a Sheriff's Sale, there is no fact specified in Ms. Storro's Affidavit indicative that the procedure for lodging a credit bid was discussed or even broached in the conversation. (Order Granting Stipulation to Augment Record, Exhibit 6, Affidavit of Tiffany J. Storro.)

Likewise with regard to the Affidavit of Fonda L. Jovick, Ms. Jovick's Affidavit gives her opinion that she "firmly believed that a credit bid in the amount of the Writ of Execution would be entered on behalf of her client" on June 2, 2009, at the Sheriff's Sale, but she fails to state from what basis she had that firm belief. (Order Granting Stipulation to Augment Record, Exhibit 5.) It appears that Ms. Storro's and Ms. Jovick's "belief" as to the procedure is more likely an assumption.

Chance has not specifically delineated in their Brief on Appeal what issues are raised on their Cross-Appeal, however, it appears from the Notice of Cross-Appeal filed by Chance April 6, 2011, the sole issue being asserted is whether the District Court erred in failing to find "very slight additional circumstances" to justify setting aside the Sheriff's Sale. This issue is identified as the second issue in Cross-Appellant's Brief on Appeal.[1]

Additionally, the Chance asserts that certain issues concerning Chance's Motion for Extension of the Period of Redemption was also granted and no appeal taken by Jacobson. The record does not support this argument.

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[1] Jacobson notes that Chance has identified three (3) issues on appeal at page 5 of Chance's Brief, but then proceeds to argue seven (7) separate issues in the Argument section of their Brief.

II. ARGUMENT

A. Did Jacobson Properly Appeal the District Court's Ruling on Chance's Motions?

Chance argues that their Motion to Equitably Extend the Period of Redemption was not appealed by Jacobson. The record reflects that Chance filed a Notice of Redemption on January 19, 2010, several weeks after the statutory period of redemption had lapsed on or about December 2, 2009. Nothing further occurred until Chance filed their Memorandum in Support of Motion to Set Aside Sheriff's Sale and Alternative Motion to Extend Redemption Period on or about April 21, 2010. (See Exhibit 10 to Respondent's Motion to Augment Record Bates File No. 54-61.) Although Chance supported their Memorandum with the Affidavits of Arthur Bistline, David Noonan, Earline Chance, Tiffany Storro, Fonda Jovick and Supplemental Affidavit of Tiffany Storro dated April 23, 2010, no actual "motions" were filed or appear in the record. Further, the record contains no Judgment or Order granting Chance's Motion to Extend the Period of Redemption.

At hearing, following the argument of counsel, the transcript contains the following finding and decision by the Court entered on the record on May 5, 2010.

> I do find under these circumstances, and there does not appear to be any issue in terms of these material facts, that a $1,000.00 bid for the real property at issue was grossly inadequate and would be – would constitute gross inadequacy of consideration. It does appear to be coupled with very slight additional circumstances, those circumstances as being shown from the record, the affidavits.
>
> So in balancing the equities, it appears appropriate under these circumstances to set aside the sheriff's sale or allow redemption. And I'm going to direct this back at counsel. It seems to me if I'm going to have to fashion a remedy, certainly he would be entitled to receive interest on the monies that he paid if he can show there is –

> that he had to forgo some other business opportunity by paying the $1000.00 and can prove additional damages. Those would be appropriate. Plus attorneys' fees, costs that he has incurred. That would all contribute to having a fair result.
>
> So, I'm going to wait for you all to talk, figure out what you want to do in light of my ruling and then submit an Order or have this noted again and we'll go from there.
>
> Tr. May 5, 2010, p.25,ll.22-p.26,ll.20
> [underline added]

Without consulting counsel for Jacobson, counsel for Chance submitted an Order entitled "Order Re: Motion to Set Aside Sheriff's Sale" that reads as follows: " The matter having come before the Court on May 5, 2010, and for the reasons set forth on the record in open court, it is hereby ordered that the sheriff's sale, which occurred on June 2, 2009, is set aside." Dated this 19th day of May, 2010, signed Honorable Steven C. Verby. (R. p.121-2)

Following the Court's entry of the above-referenced Order Setting Aside Sheriff's Sale drafted by Chance's counsel, Jacobson filed his Motion to Reconsider or to Alter/ Amend Judgment/Order.

It is disingenuous at best for Chance to argue on appeal that Jacobson should have appealed a Court ruling extending the period of redemption when the Court's oral ruling was in the alternative (granting relief of either setting aside the Sheriff's Sale or "allowing" the redemption), especially since Chance's counsel submitted the Order containing only the relief from Sheriff's Sale. If, indeed, the Court ever entered the relief of extending the redemption period, the record is completely devoid of such an order or ruling. The reason for the state of that record is solely attributable to Chance and their counsel who apparently abandoned the Motion to Extend

Redemption Period by failing to include it within any Court Order or further discussing or raising it in subsequent hearings.[2]

It is reasonable to conclude from this that Chance elected not to redeem the property, but, rather, to reset the Sheriff's Sale because Chance believes the property to be worth less than their $87,000.00 Judgment and prefer to reset the sale in order to later pursue a deficiency Judgment

For the reasons set forth above, Chance's assertion that Jacobson failed to properly appeal the Order Extending the Right of Redemption should be rejected, as no such "Order" entered.

B. The Court's Memorandum Decision Applying a Shock-the-Conscience Standard is a New Standard and One Not Supported by Idaho Law.

In Chance's Brief, they assert that the shock-the-conscience standard is one previously adopted by the Idaho Supreme Court in Gibbs v. Claar, 58 Idaho 510, 520, 75 P.2d 721, 725 (1938).

Chance fails to note that the Gibbs matter involved entirely different facts and law. The court appointed trustees with power to settle the affairs and sell the real estate of a forfeited corporate entity pursuant to statutory authority. The trustee reported to the court that it received, what was believed to be, an appropriate offer from the Plaintiff Gibbs. The District Court issued an Order setting a hearing on the proposed sale and gave notice through publication. Apparently, the published notice differed from the Court's Order in that the published notice provided opportunity for third parties to appear and bid. On the hearing date, third parties appeared and bid well in

[2] Following the Court's entry of the Order Re: Motion to Set Aside, the matter was set for hearing on Jacobson's Motions to Reconsider on June 23, 2010, at which point Chance's counsel failed to appear and an interim District Judge granted fees and costs and followed again by a hearing on October 6, 2010, in which the Honorable District Judge Steve Verby took under advisement Jacobson's Motions to Reconsider and Alter or Amend Judgment/Order. At neither of these hearings did Chance ever assert alternative relief of extending the redemption period.

excess of the proposed sale price offered by Gibbs. At a hearing set for confirmation of the Gibbs sale, the Court then continued the matter to a later hearing date to consider all bids including those third party offers.

At the continuation of the hearing, stockholders of the forfeited corporation appeared and objected. Numerous bidders entered the fray and the property was bid up to over $5,000.00 including a subsequent bid by Gibbs, who was ultimately outbid by a third party. Gibbs filed an appeal from the Court's Order confirming the sale to the high bidder. Gibbs argued on appeal that the sale being conducted pursuant to the court-appointed trustee's authority was "not a judicial sale" and that the Court did not have authority to appoint trustees to wind up the affairs and dispose of assets held by the defunct or forfeited corporation. Gibbs v. Claar, 58 Idaho 510, _____, 75 P.2d 721, 724 (1938).

The Idaho Supreme Court noted that it is well established that a trial judge acting in equity proceedings can exercise authority over the sale of property being directed by the court pursuant to the Court's appointment of trustee. It is in the context of this discussion of the court-directed sale that the Idaho Supreme Court refers to the "shock the conscience" standard found in Chance's brief in Ballentyne v. Smith, 205 U.S. 285, 27 S.Ct. 527, 528, 51 L.Ed 803 (1907).

The Idaho Supreme Court noted in Gibbs that the sale was neither a judicial sale, nor a receiver's sale. Rather, the sale was conducted by court appointment of trustees pursuant to the then-existing statutory authority, for the purpose of winding up the affairs and disposing of the assets of a defunct corporation. (See then-existing Idaho Code § 29-158 and § 29-611).

Additionally, the Gibbs Court noted that a trustee's sale is always subject to court approval.

The present case stems from entirely different facts, statutory authority and case law.

The Notice of Sheriff's Sale indicates as follows:

> Notice is hereby given that on the 2nd day of June, 2009, at 10:00 a.m. of said day at the courthouse, 215 S. First, Sandpoint, ID 83864, I will sell all the right, title and interest of said defendant in and to the said above-described copy at public auction to the highest bidder for cash in lawful money of the United States to satisfy said writ of execution and all costs.
>
> Given under my hand this 1st day of May, 2009.
>
> Darrell Wheeler, Sheriff
>
> By /s/
> Diana Moore, Deputy

R.pp.64-65

The record is undisputed that Jacobson was the high bidder, having paid $1,000.00 cash at said sale. The record is undisputed that the Writ of Execution and Sheriff's Sale was correctly conducted pursuant to the statutory authority. It appears the Writ of Execution was issued pursuant to Idaho Code § 11-102(1), which provides in pertinent part that the sheriff is directed to execute against the real property of the defendant with the proceeds applied toward satisfaction of the creditor's judgment". I.C. § 11-102 (2011).

The subject sale is not under Court supervision, oversight, or approval, except when equitable relief applies, as sought by Chance. Thus, the standard in Gibbs applied by a Court in a court-supervised sale of corporate assets has no bearing in this case.

For these reasons, the case law of Gibbs v. Claar argued by Chance is inapplicable.

Of more pertinence to this case, and the applicable law in this matter, is Chance's reference to the case of Equitable Life Assurance Society of the U.S. v. Clapier, 121 Idaho 200, 202, 824 P.2d 131, 133 (App.1981). (Chance's Brief, p.9.)

In Equitable, the Idaho Court of Appeals noted that "Clapier's Motion to Set Aside Sheriff's Sale is subject to the rule stated in Gaskill v. Neil, 77 Idaho 428, 293 P.2d 957 (1956), that such a motion must be made promptly and without unreasonable delay". Equitable Life Assurance Society of the U.S. v. Clapier, 121 Idaho 200, 203, 824 P.2d 131 (App.1991). In Equitable, the debtor waited eighteen (18) months after the date of sale to file a motion to set aside the sale. The size of the property dictated a one-year statutory period of redemption.

In this case, the period of redemption was six (6) months, concluding on December 2, 2009. Chance waited five and a half (5 ½) months before preparing, submitting and filing a Stipulation to Set Aside the Sheriff's Sale, but without notice to Jacobson. The Order to Set Aside Sheriff's Sale was entered November 20th and mailed to Jacobson by the Clerk on November 27th, just five (5) days prior to the expiration of the period of redemption. (R.p.81) Once Jacobson received the improperly entered Court Order Setting Aside Sheriff's Sale, Jacobson acted promptly to quash the Order and subsequently sought issuance of a Sheriff's Deed to the property. (R.p.108).

Chance offers no explanation for their delay from June 2, 2009, until April 21, 2010, when Chance's new counsel filed the Memorandum in Support of Motion to Set Aside Sheriff's Sale and Alternative Motion to Extend Redemption Period. Further, no explanation is proffered for why a timely motion was not filed within the redemption period or why redemption was not made before December 2, 2009. Chance's request for equitable relief comes more than four (4) months after the six (6) month period of redemption expired and more than ten (10) months after the original sale date. Chance only asserts that the consideration was so grossly inadequate that the Court should have sympathy on them. Chance provides no explanation for the general rule of equity "that a party will not be permitted to benefit by, or take advantage of, his own fault or neglect". Garren v.

Butigan, 96 Idaho 906, 908, 539 P.2d 259, 261 (1975); citing McKenney v. McNearney, 92 Idaho 1, 435 P.2d 358 (1967).

For these reasons, this Court should reverse the Trial Court.

C. Unclean Hands and Equitable Relief

Chance argues that Jacobson failed to raise the issue of unclean hands at the District Court level.[3] These issues were argued by both counsel at the hearings May 5, 2010, and October 6, 2011. (Tr. May 5, 2010, pp.6-8). The Trial Court even queried this issue:

> The Court: So what's the reason for the delay? That's what the – Mr. Jacobson drills in the Brief in Opposition. So, it happened and then you sleep on your rights and, what, ten months? Ten months before a Motion is filed?
>
> Tr. May 5, 2010, p.10, ll.9-13

At the October 6th hearing, the Intervenor, Jacobson, admitted as Exhibit No. 1 and Exhibit No. 2 proof that Jacobson, rather than Chance, had paid County taxes in arrears while Chance has failed or neglected to protect the property from tax sale. (See Clerk's Certificate of Exhibits Nos. 14 and 15).

Additionally, pending this appeal, Jacobson has continued to bring current the tax arrears on the subject property while Chance has failed, neglected or refused to do the same. (See Addendum A attached hereto).

Finally, the issue of unclean hands and equitable relief was raised in briefing. "The Plaintiffs asks this Court to provide them equitable relief when they, themselves, have not acted promptly or appropriately in pursuing the relief they seek....." (Reply Brief, p.7) (Tr.p.170)

[3] Appellant's Opening Brief, Section C, asserts that Chance has unclean hands and has adequate

Chance relies heavily upon an unpublished decision in the New Jersey Appellant Division entitled Wells Fargo Bank, N.A. v. Ahmed for the argument that in times of economic trauma, the standard for equity should be relaxed. Chance asserts that the Court should not apply a mechanistic approach, essentially saying that "two wrongs do make a right". Chance's contention is that while they and their former counsel erred in not appearing at the Sheriff's Sale or submitting a written creditor bid, that their error is offset by Mr. Jacobson's grievous error of submitting a low bid at Sheriff's Sale. Even the Trial Court recognized Mr. Jacobson's risk associated with bidding on a property with a squatter-tenant and much cleanup work to be done. (Tr. October 6, 2010, pp.21-22.)

This fact provides a likely illustration for why the Idaho Courts have previously always required not only inadequate consideration, but some finding of "other circumstances". A failure to find other circumstances renders every Sheriff's Sale subject to the whim and fancy of a Court's conscience to determine what does or does not "shock" its conscience. As the Trial Court noted, a successful bidder is usually buying other legal problems and expense beyond the purchase price, as well as risks associated with clear title and possession. (Tr. October 6, 2010, pp. 21-22.)

The Court's Memorandum Decision found no "additional slight circumstances" accompanies the inadequate consideration. (R. p.170).[4] The Court concluded that Mr. Jacobson's bid was so inadequate as to "shock the conscience". This decision to abandon the requirement of additional circumstances (even slight) throws aside all objective determinations of where a sale stands. The question of who has acted equitably becomes a fully subjective analysis with every Sheriff Sale.

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remedies at law prohibiting the equitable relief of setting aside the Sheriff's Sale.

[4] The District Court in its Memorandum Decision acknowledged that the shocking the conscience standard adopted by the District Court is a matter of first impression and not

For the reasons set forth above, this Court should reverse the District Court's finding and remand with instructions to reinstate the June 2, 2009, Sheriff's Sale with instructions to issue a Sheriff's Deed to Roy Jacobson.

D. The District Court Did Not Make a Finding That Chance is Likely to Have No Adequate Remedy At Law. If the District Court Did Make Such a Finding, it is in Error.

Chance asserts in their Brief that "the ability to sue a third party is not an adequate remedy at law for purposes of defeating equitable jurisdiction". (Cross-Appellant's Brief on Appeal, p.13). Chance also argues the Court found they have no adequate legal remedy. This assertion is contrary to Idaho case law and the record.

In Farmers National Bank v. Wickham Pipeline Construction, 114 Idaho 565, 759 P.2d 71 (1988), third party plaintiffs entered into a government contract for construction of a pipeline and then subcontracted with Wickham for work to be performed. Another third party supplier provided defective materials, specifically pipe, causing added expense and delay to the project and resulting in Wickham borrowing monies from Farmers National Bank (plaintiff). More than two (2) years into the litigation, but after the statute of limitations had run on legal claims, the third party plaintiffs filed an action against the third party supplier for indemnification. In ruling that the equitable proceedings for indemnification were not available, the Idaho Supreme Court noted "that suits in equity shall not be sustained .... in any case where plain, adequate and complete remedy can be had at law." Farmers National Bank v. Wickham Pipeline Construction, 114 Idaho 565, 568, 759 P.2d 71, ____ (1988) quoting Parker v. Winnipiseogee Lake Cotton and Woolen Company, 67 U..S 545, 551, 17 L.Ed. 333, 337 (1863). Quoting the Restatement Second of Contracts, the Idaho

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established law. (R. p.170)

Supreme Court noted as follows:

> ....."During the development of the jurisdiction of courts of equity, it came to be recognized that equitable relief would not be granted if the award of damages at law was adequate to protect the interests of the injured party."
>
> Accordingly, there is no need to entertain an equitable cause of action for indemnification when Scona and CNS, *a fortiori,* had a legal cause of action against Beal for breach of contract.
>
> Farmers National Bank, supra quoting
> Restatement Second of Contracts, § 359
> Comment A (1981)

In this matter, Jacobson has asserted from the beginning that Chance has legal remedies, not only as against their former counsel for failing to submit a credit bid, but also against the Defendant, Carol Blazier-Henry ("Blazier-Henry"). Pursuant to Idaho law, Chance can seek and obtain a deficiency judgment against the Defendant Blazier-Henry, a form of relief that is, in fact, asked for in Paragraph 6 (of the Prayer for Relief) contained in Chance's Complaint for Foreclosure. (R.p.17).

Much has been made in argument by Chance of the Defendant Blazier-Henry's financial condition including the assertion that she may file for bankruptcy protection. However, the record is devoid of any facts or evidence to support this contention. It is mere argument. The procedural history beginning with the June 2nd Sheriff's Sale is clear that Chance has relied entirely upon the notion of equitable relief in setting aside the Sheriff's Sale.

Chance's former counsel delayed a Motion to Set Aside the Sheriff's Sale from June 2, 2009, until a Stipulation and Order was submitted to the Court on November 17, 2009. This is despite the fact that the Affidavits of Fonda Jovick and Tiffany Storro make clear that Chance's

counsel was aware of Mr. Jacobson's $1,000.00 bid on the day of the sale, June 2, 2009. (Augmented R. Exhibits 5 and 6, Affidavits of F. Jovick and T. Storro).

Idaho case law establishes a remedy that Chance could have availed herself of immediately. Idaho case law is clear that:

> The proper remedy to set aside a judicial sale, which has been wrongfully made, prior to the execution of the sheriff's deed, is by motion in the principle action. Notice of the motion should be served upon the adverse party or upon the purchaser.
>
> Wooddy v. Jameson, 5 Idaho 466, ____, 50 P. 1008, 1009 (1897)

For reasons that remain unknown, Chance failed to take advantage of the legal remedy available. These are legal remedies that were available to Chance for the six (6) months during the period of the right of redemption.

Chance deferred their legal remedies and instead waited until April 21, 2010, to seek equitable remedy in the form of asking the Court to equitably set aside the Sheriff's Sale or extend the period of redemption.

"..... 'When an adequate remedy at law is available, the court may not resort to principles of equity.'.....Equity will not afford relief to plaintiffs where they have passed up an adequate remedy at law." Farmers National Bank v. Wickham Pipeline Construction, 114 Idaho 565, 569, 759 P2.d 71, 75 (1988); quoting Austin v. North American Forrest Products, 656 F.2d 1076, 1089 (5th Cir.1981).

Further, ".....where inadequate remedy at law has been lost by negligence or lack of diligence, equity will not interfere, since equity is not solicitous for those who sleep on their

rights." Id.; quoting American Surety Company of New York v. Murphy, 152 Fla. 862, 13 So.2d 442, 443 (Fla.1943).

Whether by neglect or lack of diligence, Chance failed to pursue their legal remedy discussed in Wooddy.

This Court should reverse the Trial Court's finding and remand with instructions that the Court should order the issuance of a Sheriff's Deed in favor of the purchaser Jacobson.

E. Chance's Appraisal Opinions

Chance argues that Jacobson failed to object to the use of the Noonan Appraisal and has waived that objection on appeal. Jacobson does not assert that the Noonan appraisal is inadmissible, only that the Court improperly applied the value in its Memorandum Decision. The Court concluded that the appraised value of the real property was $99,000.00 based upon the Noonan Appraisal. Jacobson questions whether that fair market value definition appropriately matches the case law of what is fair value at a Sheriff's Sale.

> In short, the price at a fair sheriff's sale would be a price in the range a neutral outsider under no constraint to buy would reasonably be willing to risk paying at a forced sale conducted by open bidding. Property sold at a sheriff's sale will not normally sell for a price approaching its fair market value. Always to be considered is the underlying need for judicial sales to be final.
>
> Sisk v. McIlroy & Associates, 934 S.W. 2d 567, 570-1, (Mo.App., Div. 1, 1996)

The Trial Court improperly positioned Noonan's Appraisal of $99,000.00 against Jacobson's $1,000.00 bid to conclude the sale "shocked the conscience". No consideration was made of the conditions of a Sheriff's Sale in general (as discussed in Sisk) and of this property

that was littered with trash and contained a squatter tenant. (Augmented R., Exhibits 3 and 13; Affidavits of Roy Jacobson).

It is Jacobson's position that the Trial Court in this matter should have considered the Noonan Appraisal for what it is, an appraisal of fair market value, and, therefore, represents the value of that property had it been sold under normal market conditions. The Trial Court should have then properly discounted, or at least acknowledged, that value at a Sheriff's Sale under forced conditions represents a value significantly less than market value. This fact is the very reason why Idaho case law requires additional circumstances besides inadequate consideration before setting aside a Sheriff's Sale.

This issue was not waived at the Trial Court level. Jacobson appealed to the Court's findings as found in the Memorandum Decision issued January 14, 2011, resulting in the Final Judgment and Rule 54(b) Certificate issued February 9, 2011. (R.pp.164-177)

For the reasons set forth above, this Court should reverse the Trial Court's findings in the Memorandum Decision and remand with instructions to reinstate the Sheriff's Sale and direct the Sheriff to issue a Deed to the purchaser, Jacobson.

F. Chance's Contention on Cross-Appeal that Additional Circumstances Exist is Not Supported by the Record or Idaho law.[5]

This issue was raised by Chance during Jacobson's Motion to Reconsider or to Alter/Amend Judgment/Order. The District Court requested additional briefing, which both sides presented. (R.pp.148-163)

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[5] Although not specifically identified as such, Jacobson logically assumes that this is Chance's issue on Cross-Appeal since the Cross-Appeal identifies a single issue – "Did the District Court err in holding that there did not appear to be very slight additional circumstances accompanying the gross inadequacy of price in this instance?" (R.p.183)

The fact is that no reported appellate case in Idaho supports Chance's contention on Cross-Appeal that counsel's misunderstanding of Sheriff's Sale procedures constitutes "slight additional circumstances".

While the decision to set aside a Sheriff's Sale is within the discretion of the Court, that discretion is not unlimited and the District Court must base its decision on the pertinent principles of law or equity applicable to the circumstances of the case. (See Equitable Life Insurance v. Clapier, 121 Idaho 200, 824 P.2d 131, (App.1991).

The case law is clear that where the sheriff fails to comply with the correct procedure, the District Court is correct in setting aside the sale. Fulton v. Duro, 107 Idaho 240, 687 P.2d 1367 (App.1984). The U.S. Supreme Court has held that failure to provide "actual notice of the sale" constitutes an unconstitutional deprivation of property without due process of law and supports setting aside of Sheriff's Sale. Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 2d, 180 (1983); quoted in Tudor Engineering v. Mouw, 109 Idaho 573, 709 P.2d 146 (1985).

Further, the Court may act in equity where there exists between the parties fraud, mistake or other circumstances appealing to the Court's equitable jurisdiction, to deprive a purchaser or party *with unclean hands* from benefitting from his wrongful conduct. Steinour v. Oakley State Bank, 45 Idaho 472, 262 P. 1052 (1928) [where bank/creditor representative promised debtor that bank would extend time for redemption].

Finally, the Court has recognized "other circumstances" where the defendant/debtor was determined legally incompetent from prior to filing of the debt collection action through the time of sheriff's sale. Southern Idaho Production Credit v. Ruiz, 105 Idaho 140, 666 P.2d 1151 (1983).

The Idaho Case Law does not support setting aside the sale where the purchaser comes to the Court with clean hands unless additional circumstances of fraud, lack of due process or notice or incompetency of a party can be shown. No case in Idaho allows the setting aside of the sale base upon the mere mistake or oversight of the moving party, especially when that party has been less than diligent in pursuing its rights.

Directly on point to this case, where the creditor's attorney intended to (but did not) cancel or attend the Sheriff's Sale, the mere assertion of the Creditor's attorney's error is *not* a basis to set aside the sale and the appellate court reversed the trial court's order setting aside sale, noting that the creditor and debtor have other remedies in the nature of redemption rights or claims against legal counsel to address inequities they might suffer. McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2003) The McNeill court went on to note the importance of bringing finality and certainty to foreclosure sales that are properly conducted in consideration of all parties' rights.

For the reasons above, the Court should deny Chance's Cross-Appeal and reverse the Trial Court's finding.

G. Attorney's Fees

A party seeking attorney's fees on appeal must set forth authority allowing for the recovery of attorney's fees. Commercial Ventures v. Lea Family Trust, 145 Idaho 208, 177 P.3d 955 (2008). Chance has failed to articulare any authority for attorney's fees on appeal.

Further, the Trial Court's Memorandum Decision sets forth a standard or ruling of first impression. Cases of first impression are not appropriate for an award of fees on appeal pursuant to I.C. § 12-121. Stout v. Key Training Corp., 144 Idaho 195, 199, 158 P.3d 971, 975 (2007).

Based upon the forgoing, Chance is not entitled to attorney's fees on appeal. The well-established case law in Idaho was ignored by the Trial Court. This Court should follow the precedential decisions noted above. Jacobson is entitled to an award of his fees and costs as set forth in Appellant's Brief.

III. CONCLUSION

For the reasons set forth in the trial record and asserted above, this Court is respectfully asked to reverse the Trial Court's Decision and to remand this matter with instructions to the Trial Court to enter Judgment in favor of Appellant, Roy Jacobson, specifically issuing a Deed to Mr. Jacobson as purchaser at the Sheriff's Sale on June 2, 2009.

RESPECTFULLY SUBMITTED this 27th day of April, 2012.

FEATHERSTON LAW FIRM, CHTD.

By _____
BRENT C. FEATHERSTON
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was delivered this 27th day of April, 2012, to the following people in the manner indicated:

Arthur M. Bistline, Esq.
1423 North Government Way
Coeur d'Alene, ID 83814

[X] U.S. Mail, Postage Prepaid
[ ] Overnight Mail
[ ] Hand delivered
[ ] Facsimile No. (208) 665-7290
[ ] Other: _____

By _____